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No. 450

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

ANNA SCHOMMER, JOHN J. HOROWITZ and MILTON M. ADELMAN, Owners of Certain first mortgage five per cent gold bonds of Chicago Railways Company, and Chicago City Railway Company,

Petitioners,

VS.

JAMES H. WILKERSON, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division, and the other Judges and Officers of said Court,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF

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An examination of respondent's reply in opposition to the petition for certiorari discloses a position different from that taken by him in the Circuit Court. Whereas he there filed no brief and made no argument, but only a sworn answer (Tr. 27-9) submitting his action to the Court's judgment on the 16,000 page printed record of the two questioned foreclosures, he now for the first time attempts to raise certain technical objections. These objections are both improper and without merit.

Respondent's position here, and that of the Circuit Court below, would bar all relief under Section 262 of the Judicial Code, calling into question judicial orders

not otherwise reviewable except for active fraud or corruption. An honest effort, they contend, should prevent its re-examination by a higher court, where discretion is involved. The proposition carries its own refutation and was decided otherwise in *Re* Babcock, 26 Fed. (2) 153, and *Bedgisoff* v. *Cushman,* 12 Fed. (2) 667.

The 16,000 page exhibit of respondent's printed record in the two questioned foreclosures prepared under his supervision discloses no reason for the Circuit Court's judgment that the case is complicated. A critical examination of these proceedings will but confirm the charge that the difficulties were of respondent's own making. They could and should have been avoided. The cases should have been disposed of long, long ago; and unless this court invokes its supervisory power they will continue to pend, as they have continued, at respondent's pleasure and the bondholder's expense.

Respondent cannot raise the insufficiency of the form of the petition or procedural matters here for the first time. If the procedural objections to petitioners' motion and petition had been pointed out by respondent or the parties below, leave to meet them would have been asked. The parties did not even appear before respondent on the motion. It was only on the court advisor's motion that respondent acted. The court advisor's action in that respect was certainly self-serving in view of the fact that he was not a party and the propriety of his fees was "under fire."

The admitted facts set forth in the petition certainly more than amply meet respondent's objections to the granting of such relief as petitioners may in law be entitled to. The prayer is a formality and is not controlling. The same is true as to the allegation of previous demand. Where it appears futile, previous demand is unnecessary. So with the allegation of good faith and fraud. The facts in each case control.

A cursory examination of the sixteen volumes of printed record will disclose volumes devoted to pleadings, reports, statements of operations, and briefs unnecessarily incorporated therein. The foreclosures are simple and should have taken up but a fractional part of the record. The voluminousness of the printed record is but another evidence of the profligacy rampant in these foreclosures. The pleadings and orders in the City Railway case filed in 1930 followed those in the Railway case filed in 1927. Yet they are all in the printed record, not once, but twice,—once on the motion for leave and again after leave was granted. The cases were identical and repetition was unnecessary. Again, in the first case the same attorneys represent the trustee and the bondholders' committee, whereas in the second there were two sets of attorneys. The foreclosures like the operation of the mortgaged properties should have been consolidated from the start. The record reeks with waste, delay and disregard of the bondholders' rights.

Since petitioners filed their objections in the District Court on December 26, 1939, the matters complained of still persist and will continue unless this petition is granted. Judicial Code Section 262 should be liberally construed to correct actual or threatened misconduct or abuse of power below.

Respectfully submitted,

CHARLES P. SCHWARTZ,
Attorney for Petitioners.